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No. 92-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PEDRO ALVAREZ-SANCHEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. WHETHER 18 U.S.C. § 3501(c) GIVES A LOWER COURT DISCRETION TO SUPPRESS A CONFESSION WHEN THE CONFESSION WAS GIVEN AFTER MORE THAN SIX HOURS OF DELAY IN ARRAIGNMENT AND THE DELAY WAS NOT REASONABLE.

2. WHETHER SUPPRESSION BASED ON DELAY IN ARRAIGNMENT OF MORE THAN SIX HOURS IS PERMISSIBLE UNDER 18 U.S.C. § 3501(c) WHEN THE DELAY IN ARRAIGNMENT TAKES PLACE WHILE THE DEFENDANT IS BEING HELD IN STATE CUSTODY.

3. WHETHER SUPPRESSION OF A CONFESSION IS INDEPENDENTLY MANDATED BY THE FOURTH AMENDMENT WHERE THE CONFESSION IS GIVEN AFTER MORE THAN 48 HOURS OF DELAY IN THE JUDICIAL DETERMINATION OF PROBABLE CAUSE REQUIRED BY THE FOURTH AMENDMENT AND THERE IS NO SHOWING THAT THE DELAY IN EXCESS OF 48 HOURS WAS REASONABLE.

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Defendant-respondent PEDRO ALVAREZ-SANCHEZ hereby submits his brief in opposition to the Government's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari is largely accurate in its description of the circumstances surrounding Mr. ALVAREZ' arrest and detention. It should also be noted, however, that the state authorities' notification of the

Secret Service about the discovery of the counterfeit money was pursuant to a "department policy". See Govt. Pet., App. E, at 57a. Further, the Los Angeles Sheriff's Department detective who was apparently in charge of the investigation was holding Mr. ALVAREZ in part because he was considering state charges against Mr. ALVAREZ involving the counterfeit currency; specifically, he stated that, "[h]ad the Secret Service decided not to presecute [sic] [Mr. ALVAREZ] federally, I would have presented both the narcotics and counterfeit violations to the District Attorney." Govt. Pet., App. E, at 59a. Mr. ALVAREZ was thus not being held by the state authorities solely on narcotics charges but was being held in part based on the counterfeit currency.

The record also reflects that no steps were taken to prepare for arraignment of Mr. ALVAREZ in federal court until after the interrogation by Secret Service Agent Lipscomb. See 10/31/88 Tr., at 8-9, 14-16. While the record does not reflect how long the interview took, it does suggest that the interview took some period of time. See Govt. Pet., App. C, at 51a-53a, App. D, at 54a-56a. Even prior to the interrogation, moreover, the officers knew (1) 113 counterfeit bills had been found in a jacket in Mr. ALVAREZ' home; (2) Mr. ALVAREZ had told the officers who arrested him that the clothing in the closet where the jacket was found belonged to him; and (3) rent receipts with Mr. ALVAREZ' name on them had been found in the apartment. See 10/31/88 Tr., at 21.

The Court of Appeals in reversing did conclude that the state custody must be taken into consideration (see Govt. Pet., App. A, at 20a-21a & n.8) and did discuss the different approaches taken by other Courts of Appeals in considering the circumstances under which a confession must be suppressed pursuant to 18 U.S.C. § 3501 when it is made more than six hours after arrest (see Govt. Pet., App. A, at 10a-15a). In recognizing that several circuits have held that confessions may be suppressed only if they are shown to be involuntary, however, the Court of Appeals noted that the test which these courts have applied is not a standard voluntariness test but what the court described as an "expanded voluntariness" test. Govt. Pet., App. A, at 11a. The court noted that the courts using this test do not focus on "voluntariness" in the ordinary sense but go on to consider in addition the reasons for delay. See Govt. Pet., App. A, at 11a. The court suggested that this was not in reality a different approach but more "a tautologic sleight-of-hand that hides the true basis for the suppression decision." Govt. Pet., App. A, at 12a.

II.

SUMMARY OF ARGUMENT

The petition should be denied. The Court of Appeals correctly concluded that 18 U.S.C. § 3501(c) gives a lower court discretion to suppress a confession when it is given after an unreasonable delay in arraignment of more than six

hours. This is the only conclusion which can be drawn from the legislative history, and any contrary construction would make Section 3501(c) superfluous. Further, there is not a real division of opinion among the Courts of Appeals as the Government claims. Finally, there was a finding of involuntariness in the present case in any event.

With respect to the question of whether state custody must "always" be taken into consideration in applying Section 3501(c), the present case does not clearly present a factual situation where there was no "working arrangement" between state and federal authorities and so does not clearly present the issue the government seeks to have reviewed. In any event, the Court of Appeals correctly concluded that state custody should be taken into consideration -- both the plain language of the statute and policy considerations suggest such a rule.

Regardless of how this Court might resolve the issues regarding interpretation and application of 18 U.S.C. § 3501(c), moreover, suppression of Mr. ALVAREZ' confession was independently mandated under the Fourth Amendment. The confession was given after unreasonable delay in the judicial determination of probable cause required by the Fourth Amendment, a requirement which was recognized by this Court in Gerstein v. Pugh, 420 U.S. 103 (1975) and County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).

III.

ARGUMENT

A. REVIEW IS NOT WARRANTED BY THE COURT OF APPEALS' RULING THAT 18 U.S.C. § 3501(c) GIVES A LOWER COURT DISCRETION TO SUPPRESS A CONFESSION WHEN THE CONFESSION WAS GIVEN AFTER AN UNREASONABLE DELAY IN ARRAIGNMENT OF MORE THAN SIX HOURS.

Initially, the Government misstates the issue when it uses the word "must" in its description of the question presented. See Govt. Pet., at i. The Court of Appeals expressly declined to decide whether an unreasonable delay of more than six hours in arraignment requires suppression under 18 U.S.C. § 3501(c). See Govt. Pet., App. A, at 19a ("[w]e need not resolve the matter . . . for we conclude that the confession before us must be excluded under either approach").

1. Review Is Not Warranted Because The Court Of Appeals' Legal Analysis Was Correct, And The Division Of Opinion Among The Courts Of Appeals Is More Apparent Than Real.

The Court of Appeals was correct in its conclusion that Section 3501(c) gives a court discretion to suppress a confession based solely on delay in arraignment and independent of the actual voluntariness of the confession. While Section 3501(a) does provide generally that "a confession . . . shall be admissible in evidence if it is

voluntarily given," it does not state that such a confession must be admitted regardless of other circumstances.

To construe Section 3501(a) in this manner would make Section 3501(c) superfluous, moreover. As noted by both the Government and the Court of Appeals, Section 3501(c) provides that a confession "shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention." (Emphasis added.) If voluntariness mandates admission, there would be no need for this provision. Further, the negative pregnant clearly suggested by Section 3501(c) is that a confession may be excluded "solely because of delay" if not given within six hours of arrest or other detention.

The only conclusion left is that Section 3501(c) was intended to provide a qualification as to when confessions would be admitted, i.e., that a confession is admissible if it is voluntarily given, but does not need to be admitted by the trial court if it was given more than six hours following arrest or other detention. This is precisely the rule recognized by the Court of Appeals, and it is a more flexible version of the former McNabb-Mallory rule, which provided for mandatory suppression. See Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

The legislative history supports the Court of Appeals' interpretation, moreover. The initial version of the bill of which Section 3501 was a part was reported by the Senate Judiciary Committee without Section 3501(c) included. The Senate report which accompanied the bill as reported evidenced a clear intent to flatly and completely repudiate both the McNabb-Mallory rule and the advisement of rights rule established in Miranda v. Arizona, 384 U.S. 436 (1966). See generally S. Rep. No. 1097, 90th Cong., 2d Sess. 38-51 (1968), reprinted in 1968 U.S. Code & Ad. News 2112, 2124-38. At this point in the process, therefore, it seemed clear that the McNabb-Mallory rule was intended to be eliminated in its entirety.

The bill as reported was not agreeable to all, however. A minority report attached to the committee report noted that the title of the bill which contained Section 3501 "was retained in the bill by the narrowest possible margin in the committee -- an evenly divided vote of the full committee." See id. at 147 (Minority Views of Messrs. Tydings, et. al.), reprinted in 1968 U.S. Code Cong. & Ad. News at 2209. The minority "strongly opposed the committee action" and "urge[d] our colleagues in the Senate to delete Title II from the bill when it is offered on the floor of the Senate." Id.

The version of Section 3501 which was reported to the floor of the Senate and completely repudiated the McNabb-Mallory rule was thus highly controversial. An amendment

adding Section 3501(c) was therefore offered by Senator Scott on the floor of the Senate, in all likelihood to assure that the controversy did not derail the entire bill. See 114 Cong. Rec. 14,184-86 (1968).

Both Senator Scott and Senator McClellan, the floor manager of the bill, recognized that the addition of Section 3501(c) would place additional limits on the admissibility of confessions. Senator Scott stated: "My amendment provides that the period during which confessions may be received or interrogations may continue, which may or may not result in a confession, shall in no case exceed 6 hours." Id. at 14,184. Senator McClellan stated: "I do not want an unreasonable time, but I do want an opportunity for the law enforcement officers to perform their duty." Id. at 14,185. Thus, both Senator Scott and Senator McClellan recognized that Section 3501 as amended placed limits not only on the confessions which could be admitted but also on the time during which interrogation could continue.[1]

[1] Indeed, the way in which Senator Scott and Senator McClellan described the amendment suggests that suppression of confessions obtained after the period of delay should be mandatory. Senator McClellan referred to the time during which law enforcement officers would have "an opportunity" to interrogate a defendant, thereby suggesting there would not even be an "opportunity" later. Senator Scott referred to "the period during which confessions may be received or interrogations may continue", not simply a more exacting standard of admissibility for later confessions. Section 3501(c) does have to be reconciled with Section 3501(a), however, and, in any event, the Court of Appeals here did not reach the question of whether suppression under Section 3501(c) is mandatory.

The Government in its petition ignores this subsequent legislative history. It quotes commentary solely from the Senate Report which was written prior to the amendment which added Section 3501(c). See Govt. Pet., at 14 n. 3. It is the legislative commentary after Section 3501(c) was added to the bill which this Court should look to. That commentary demonstrates that Section 3501(c) was added to Section 3501 to preserve a limited and more reasonable McNabb-Mallory rule -- one which allowed a six-hour "safe harbor" period before the rule applied and one which perhaps made suppression discretionary rather than mandatory.

This is the view taken by virtually all of the Courts of Appeals which have considered the issue, moreover. While there appear on the surface to be two different lines of analysis, the differences are largely, if not entirely, semantic. As noted by the Court of Appeals in this case, several Courts of Appeals have openly recognized that Section 3501(c) gives a trial court discretion to suppress even a voluntary confession when there is a delay in arraignment exceeding six hours and that delay is not reasonable. See, e.g., United States v. Perez, 733 F.2d 1026, 1035 (2d Cir. 1984); United States v. Gaines, 555 F.2d 618, 623 (7th Cir. 1977); United States v. Robinson, 439 F.2d 553, 563-64 (D.C. Cir. 1970). See also United States v. Van Lufkins, 676 F.2d 1189, 1193 (8th Cir. 1982) (Section 3501(c) allows confession to be admitted "if certain conditions are met"; one of conditions is that "the confession must be made within six

hours after arrest or detention"). These courts of appeals thus clearly recognize that a limited McNabb-Mallory rule still exists.

Other Courts of Appeals have concededly described "voluntariness" as the only test. See, e.g., United States v. Christopher, 956 F.2d 536, 538-39 (6th Cir. 1991), cert. denied, 112 S. Ct. 2999 (1992); United States v. Bustamante-Saenz, 894 F.2d 114, 120 (5th Cir. 1990); United States v. Beltran, 761 F.2d 1, 8 (1st Cir. 1985); United States v. Mayes, 552 F.2d 729, 734 (6th Cir. 1977). Each of these courts, however, focuses not just on factors which affect the defendant's state of mind and thus the voluntariness of his or her confession but also focuses on the purpose of the delay and whether or not the officers causing the delay were at fault. See Christopher, 956 F.2d at 539 (emphasizing the delay was simply to allow arrestees to become sober before questioning); Bustamante-Saenz, 894 F.2d at 120 (noting delay not "for the purpose of interrogation or any other malevolent reason"); Beltran, 761 F.2d at 8 (finding "no purposeful postponement" and noting period of delay not used "for proscribed purposes envisioned by the Supreme Court when it created [the McNabb-Mallory rule]"); Mayes, 552 F.2d at 734 (noting district court must consider "the cause of the arraignment delay and . . . weigh this element appropriately in deciding whether the . . . statement shall be suppressed").

While using the term "voluntariness", these courts are in reality applying a balancing test similar to that applied by the other courts. As noted by the Court of Appeals in this case, there would be no need to consider the agents' purpose and fault in causing unreasonable delay if only the defendant's state of mind at the time he confessed was at issue. See Govt. Pet., App. A, at 11a-12a. The test which is being applied is in reality an "expanded voluntariness" test (Govt. Pet., App. A, at 11a) which differs only in name from the discretionary McNabb-Mallory rule applied by the other courts.

2. Review Is Not Warranted Because The Court Of Appeals Here Found The Confession To Be Involuntary In Any Event.

Even if the Court of Appeals erred in its legal analysis and was required under Section 3501(c) to look only to "voluntariness", moreover, it did so here. It specifically held "that even were we to apply all the factors set forth in § 3501(b), we would conclude that the confession should be excluded." Govt. Pet., App. A, at 23a n. 10. It went on to consider and weigh each of the factors set forth in Section 3501(b): (1) The delay; (2) the lack of representation by counsel; (3) the defendant's understanding of the nature of the charges, regarding which there was no evidence; and (4) whether the defendant had waived his Miranda rights. See id. The court then went on to consider in addition the reasonableness of the delay. See id.

Contrary to the Government's claim, the court did not apply any unusual concept of "voluntariness". Rather, by considering the five factors expressly set forth in Section 3501(b) and the reasonableness of the delay, i.e., the officers' purpose, the court applied the same "expanded voluntariness" test which is the minimal standard applied by all the other Courts of Appeals which have considered the issue. If the Government is suggesting that the reasonableness of the delay and the officers' purpose for the delay cannot be taken into consideration at all, it is arguing a position which has been rejected by every circuit.

Of course, the Court of Appeals factual analysis may be subject to dispute, as is almost any factual analysis. That is a narrow question not worthy of review by this Court with its scarce resources, however.[2]

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[2] The Court of Appeals did not improperly focus on delay after the confession, moreover, as the Government claims (see Govt. Pet., at 15-16). While the court did refer to the delay of arraignment from Monday afternoon to Tuesday morning, it was in doing so referring to a period which included the time during which the confession was obtained, for it described the delay as "specifically to provide federal officers with time to interrogate [Mr. ALVAREZ]." See Govt. Pet. App. A, at 21a. In describing the delay as being a delay from Monday afternoon to Tuesday morning, the court was simply recognizing that what appears to have been a half-hour or one-hour delay to conduct the interrogation was sufficient to prevent the arraignment from taking place anytime Monday afternoon and cause its necessary continuance to Tuesday morning. In any event, whether the lower court correctly analyzed the facts of this particular case and correctly applied this Court's decision in United States v. Mitchell, 322 U.S. 65 (1944) to these particular facts is also a fact-specific question not warranting review by this Court.

B. REVIEW IS NOT WARRANTED BY THE COURT OF APPEALS' RULING THAT DELAY IN ARRAIGNMENT SHOULD BE CONSIDERED IN APPLYING SECTION 3501(c) EVEN WHEN THE DELAY TAKES PLACE WHILE THE DEFENDANT IS IN STATE CUSTODY.

1. The Present Case Does Not Clearly Present The Issue Raised By The Government, Because The Facts Do Not Clearly Show There Was No "Working Arrangement" Between State And Federal Officials.

Even the Government concedes that a court must consider time in state custody under Section 3501(c) where there is a "working arrangement" between state and federal officials. See Anderson v. United States, 318 U.S. 350, 356 (1943). Here there may well have been a "working arrangement" of sorts, and, if so, the issue the Government seeks to have this Court address is not clearly presented.

This Court did not set forth any clear definition of "working arrangement" in Anderson. It did affirm the Court of Appeals' opinion in United States v. Coppola, 281 F.2d 340 (2d Cir. 1960), however. See Coppola v. United States, 365 U.S. 762 (1961). The test enunciated by the Court of Appeals in Coppola was a two-part test -- whether the detention of the defendant "was [(1)] at the behest of federal officers or [(2)] for the purpose of aiding any investigation they wished to conduct." Coppola, 281 F.2d at 344 (emphasis added). This is consistent with the tests apparently applied by several

other courts, moreover. See e.g., United States v. Barlow, 693 F.2d 954, 958 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983), quoting United States v. Rollerson, 491 F.2d 1209, 1212 (5th Cir. 1974) (detention "in order to allow the federal investigator to secure a confession"); United States v. Gaines, 555 F.2d 618, 624-25 (7th Cir. 1977), quoting United States v. Chadwick, 415 F.2d 167, 170 (10th Cir. 1969) (describing question as whether detention was "for the purpose of allowing federal officers to obtain a confession"). The purpose of the state officers is sufficient, moreover. See Anderson, 318 U.S. at 352 (noting that local sheriff made arrest "on his own initiative").

Here such a partial purpose is at least suggested by the record. The Los Angeles County Sheriff's Department detective who was apparently in charge of the investigation, Detective John McCann, stated in his declaration that he called the Secret Service because "[i]t is department policy that the Secret Service be informed in any case where counterfeit money is found." Govt. Pet., App. E, at 57a. Detective McCann further stated that the case was never presented to the District Attorney for a prosecutorial decision and that his decision about whether to present it was going to be dependent on whether or not the Secret Service decided to prosecute Mr. ALVAREZ. See Govt. Pet., App. E, at 59a. Detective McCann indicated he would have sought charges based on the counterfeit currency as well as narcotics, moreover. See Govt. Pet., App. E, at 59a.

This suggests that Detective McCann's purpose was at least in part to hold Mr. ALVAREZ for investigation by the Secret Service and then seek prosecution of Mr. ALVAREZ in state court depending on whether or not the Secret Service wished to prosecute him federally. This constitutes an implicit "working arrangement" which is sufficient under Anderson and its progeny to warrant consideration of state custody even if such a "working arrangement" is required under Section 3501(c).[3] Nothing in Anderson or in its logic requires that the "working arrangement" be an express arrangement in a specific case, as opposed to a broader one reflected in general policy such as Detective McCann referenced here.

Regardless of whether this constitutes a "working arrangement", it is clear that Detective McCann was holding Mr. ALVAREZ in state custody at least partially because he wanted to consider state charges based on the counterfeit currency. In essence, Detective McCann was holding Mr.

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[3] While the district court did make reference to several "working arrangement" cases and did appear to consider the question of whether or not there was a "collusive arrangement" between state and federal agents (Govt. Pet. App. B, at 50a), this cannot be viewed as a clear finding for two reasons. First, there was no reason for the district court to reach this factual issue, because the defense had argued, and the government had conceded, that under Ninth Circuit case law the state custody had to be taken into account in any event. See 10/31/88 Tr. at 26, 33. Second, the district court does not appear to have applied the proper "working arrangement" test, for it stated that there was "no evidence", not that the evidence which existed was insufficient. See Govt. Pet., App. B, at 50a. As noted above, there was at least some evidence of a "working arrangement" -- in Detective McCann's own admissions.

ALVAREZ in state custody so the state could act as a sort of "backup" prosecutor in the event the federal authorities decided not to prosecute. Where a defendant is being held in state custody for such a purpose and one of the charges being contemplated is the same as that which the federal authorities end up investigating and prosecuting, it is even more appropriate to consider both state and federal custody.

2. Even Where There Is No "Working Arrangement" Between State And Federal Authorities, State Custody Should Be Considered In Applying Section 3501(c), At Least When The Defendant Has Not Already Been Arraigned On Other Charges.

In any event, state custody should be considered in applying Section 3501(c) even when there is no "working arrangement" between state and federal authorities. This is initially suggested by the plain language of Section 3501(c). It refers to "arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency." (Emphasis added.) The reference is not limited to federal officers and can be contrasted with the reference later in the same sentence to "a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia." (Emphasis added.) The absence of any reference to law enforcement officers "empowered to arrest persons for offenses against the laws of the United States or of the District of Columbia" must be presumed to be purposeful. See, e.g., Russello v. United

States, 464 U.S. 16, 23 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").[4]

Policy considerations also support such a construction. As is suggested by the analysis set forth above, applying a "working arrangement" rule to the consideration of state custody will require courts to engage themselves in difficult factual inquiries in every individual case. Cf. Elkins v. United States, 364 U.S. 206, 212 (1960) (noting difficulty in ascertaining state/federal cooperation in Fourth Amendment exclusionary rule context). If a "working arrangement" requirement is recognized, lower courts in almost every case where an initial arrest is made by state authorities will have to inquire into what communication there was between state and federal authorities, what implicit cooperation there was, what policies there were that should be taken into consideration, and a multitude of other factors.

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[4] At least some comments made in the legislative history support such a construction, moreover. Senator McClellan, the floor manager of the bill stated: "I can appreciate that an officer might pick a suspect up at 12 o'clock at night, and need to check with officers in another State." 114 Cong. Rec. 14,184 (1968) (emphasis added). Senator Abbott spoke of a scenario where "in one of the outlying towns, . . . the sheriff picks up a man under the Dyer Act . . . on transporting a stolen vehicle across a State line illegally." Id. at 14,185 (emphasis added).

A rule barring consideration of state custody would also encourage federal officers to delay taking control of a defendant and leave the defendant in state hands while they investigate and/or with the hope that the time in state custody will "soften up" the defendant. This could defeat the purposes of Section 3501(c) and Federal Rule of Criminal Procedure 5(a) and render them largely ineffective in the many cases where parallel state investigation and prosecution is possible.

The countervailing policy considerations suggested by the Government do not outweigh these concerns. If state officers delay informing federal officers of a suspect's existence, applying Section 3501(c) simply means that the federal officers must arraign the defendant before interrogating him. While this may reduce the likelihood of obtaining a confession, it is offset by reducing incommunicado detention. If probable cause does not yet exist for arraignment on federal charges, then either the arrest is by definition illegal under the Fourth Amendment or there will be other state or federal charges on which the defendant can be arraigned. Nothing in the Court of Appeals' opinion suggests that Section 3501(c) applies to confessions obtained after a defendant has already been promptly arraigned on other state or federal charges. See post, at 19-20.

None of this Court's cases stand for the proposition that a "working arrangement" must be shown in order to require

consideration of state custody under either the original McNabb-Mallory rule or Section 3501(c). While this court did recognize the existence of such a "working arrangement" in Anderson, it did not hold that such a "working arrangement" is a necessary condition to application of the McNabb-Mallory rule.[5] Gallegos v. Nebraska, 342 U.S. 55 (1951) is inapposite because it involved neither an interrogation by federal officials nor the use of a confession in federal court.

Coppola v. United States, 365 U.S. 762 (1961) and United States v. Carignan, 342 U.S. 36 (1951) are distinguishable because the defendants there were in custody on other charges on which the defendants had already been arraigned and/or which were independently prosecuted. See Carignan, 342 U.S. at 39 (noting defendant was arrested "and duly committed" for other federal charge on same day he was arrested); United States v. Coppola, 281 F.2d at 342-343 (defendants arrested sometime in late morning, held for local police investigation during afternoon, and arraigned by local magistrate on state charges the next day; insufficient time to arraign defendant on afternoon of day arrested). This is a critical

[5] To the extent that Anderson does suggest such a requirement, it should be reconsidered in light of this Court's decision in Elkins v. United States, 364 U.S. 206 (1960). The government's claim that this Court has already rejected such reconsideration by its per curiam opinion in Coppola v. United States, 365 U.S. 762 (1961) is unfounded. As noted below, the defendants in Coppola were not detained for an unreasonable period of time before being promptly arraigned on the original state charges for which they had been arrested.

distinction, because the detention is legal once there is a prompt arraignment on other charges. See Carignan, 342 U.S. at 44.[6] The Court of Appeals' opinion in this case does not by its terms extend to the situation in which a defendant has already been or will timely be arraigned on other charges, and the Ninth Circuit will presumably distinguish such a situation if and when it is presented. Indeed, this is the same distinction which this Court did not need to consider in McNabb and later addressed in Carignan.

In sum, the plain language of Section 3501(c) and policy considerations support the view that all pre-arraignment custody should be considered in applying the six-hour "safe harbor" provisions, and this Court's prior decisions are consistent with such a rule. If the issue is to be considered by this Court, it should be considered in some other case -- where it is more clear that there was no "working arrangement" and where the lower court's legal analysis was erroneous.

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[6] The defendant in Coppola was concededly not arraigned within six hours; however, it appears that this was because he had not been in custody for six hours until the courts were closed for the day. As noted above, the defendants were promptly arraigned the next morning.

C. THE COURT OF APPEALS' HOLDING WILL BE SUBJECT TO AFFIRMANCE BY THIS COURT ON THE INDEPENDENT ALTERNATIVE GROUND THAT SUPPRESSION OF A CONFESSION IS MANDATED UNDER THE FOURTH AMENDMENT WHERE THE CONFESSION IS GIVEN AFTER AN UNREASONABLE DELAY IN THE JUDICIAL DETERMINATION OF PROBABLE CAUSE REQUIRED BY THE FOURTH AMENDMENT.

This Court recognized in Gerstein v. Pugh, 420 U.S. 103 (1975) that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to extended pretrial detention following a warrantless arrest. See id. at 126. In County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991), this court held that a delay in the required judicial determination of probable cause which exceeded 48 hours was presumptively unreasonable. See id. at 1670. This requirement is in a sense a constitutional analogue, albeit a much looser one, to the McNabb-Mallory rule. Cf. Thomas, The Poisoned Fruit of Pretrial Detention, 61 N.Y.U.L. Rev. 413, 446 (1986) (analyzing McNabb-Mallory exclusionary rule rationale to Gerstein context).

In the present case, there had been a clear violation of this constitutional requirement by the time Secret Service Agent Lipscomb interviewed Mr. ALVAREZ. Mr. ALVAREZ had been held in custody for 2-1/2 days, and Detective McCann noted in his declaration that there was no reason for this other than a belief that the law allowed him to take his time. At the time Agent Lipscomb interviewed Mr. ALVAREZ, therefore, his

detention was unquestionably unlawful. This constitutional violation requires suppression of the evidence developed by the federal authorities regardless of whether there was a "working relationship" between state and federal authorities and regardless of whose custody Mr. ALVAREZ was in.

Initially, the exclusionary rule should apply to this type of Fourth Amendment violation just as it is to any other, regardless of whether or not there was probable cause for the arrest.[7] Thomas, supra p. 21, at 435 (1986). Ignoring the prompt judicial determination of probable cause requirement established in Gerstein and McLaughlin is functionally the same as ignoring search warrant requirements. The Fourth Amendment requires that a warrant be obtained if there is time and mandates application of the exclusionary rule if a warrant is not obtained; similarly, the Fourth Amendment requires a judicial determination of probable cause for detention once there is time and must mandate application of the exclusionary rule if such a determination is not obtained.

Further, application of the exclusionary rule in this context should not turn on whether or not there was a "working

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[7] Few courts appear to have considered this issue, perhaps because they can instead turn to court rules and/or statutes such as Rule 5(a) and 18 U.S.C. § 3501. One state court has suggested that a violation of the Gerstein requirement requires suppression, while another has held that it does not. Compare Williams v. State, 264 Ind. 664, 674-75, 348 N.E.2d 623 (1976) with People v. Lucas, 88 Ill. App. 3d 942, 948, 410 N.E.2d 1040 (1980). To commentators who have addressed the issue have suggested that the exclusionary rule should be applied. See 2 W. LaFave, Search and Seizure 425 (2d ed. 1987); Thomas, supra p. 21, at 460-61.

arrangement" between state and federal officers or whose custody the defendant was in. Such a conclusion is compelled by this Court's analysis in Elkins v. United States, 364 U.S. 206 (1960), in which the Court ruled that no cooperative relationship was required in order to suppress evidence obtained through other Fourth Amendment violations. Indeed, the history of this Court's decisions which led up to the Elkins decision are similar to the development of the law in the prompt arraignment context. This Court originally applied a "joint operation" requirement because it had held the Fourth Amendment did not apply to state officials; the Court then decided that the Fourth Amendment did apply to state officials; and this new rule that the actions of the state officials were unlawful under the Fourth Amendment meant the fruits of their actions could not be used in the federal prosecution. See Elkins, 364 U.S. at 211-13. Similarly, here, there was initially no constitutional rule recognized but only the federal supervisory and statutory rules recognized in McNabb-Mallory and Section 3501(c); the Court has since decided in Gerstein and McLaughlin that there is a constitutional requirement of a prompt judicial determination of probable cause; and, now that extended detention in state custody must be viewed as violative of the federal constitution, the exclusionary rule should be applied to evidence obtained while a defendant is in state custody just as it is to evidence obtained while the defendant is in federal custody.

Finally, suppression of evidence obtained as a result of a Fourth Amendment violation is mandatory.[8] This eliminates any need to address the question of whether Section 3501(c) is mandatory or discretionary and, if the latter, what standards govern a court's exercise of discretion.

In sum, the lengthy 2-1/2 day delay here complicates -- and likely moots -- the issues the Government raises -- by bringing the requirements of Gerstein v. Pugh and Riverside County v. McLaughlin into play. The result reached by the Court of Appeals here would have to be upheld based on the constitutional requirements recognized in those decisions, regardless of whether the Court of Appeals' application of Section 3501(c) was correct. To the extent the Government might argue that the exclusionary rule does not apply to a violation of the requirements of Gerstein and McLaughlin, moreover, this Court would have to consider the additional difficult question of whether and how an exclusionary rule should be applied in that context, and the Court would have to do this in the almost complete absence of any lower court experience in analyzing the issue. The Court should therefore deny the petition in this case and await a case which does not mix issues by involving Gerstein and McLaughlin with the Section 3501(c) issues raised by the Government.

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[8] Suppression may, of course, be inappropriate where the "attenuation", "independent source", or "inevitable discovery" exceptions to the exclusionary rule apply. See, e.g., Brown v. Illinois, 422 U.S. 590 (1974). See generally Murray v. United States, 487 U.S. 533, 536-39 (1988). None of those exceptions are even remotely applicable here, however.

IV.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: July 7, 1993

CARLTON F. GUNN
Deputy Federal Public Defender

GUNN5/jj/wp/

No. 92-1812

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

PEDRO ALVAREZ-SANCHEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 9th day of July, 1993, a copy of Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid,

* * *

* * *

to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for the Petitioner.

Respectfully Submitted,

DATED: July 9, 1993

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AFFIDAVIT OF MAILING

I, CARLTON F. GUNN, a member of the Bar of this Court, hereby certify that to the best of my knowledge, the attached Petition for Writ of Certiorari was deposited in a United States Post Office mail box, with first class postage prepaid,

* * *

* * *

and properly addressed to the Clerk of the Court on July 9, 1993, within the permitted time for filing this brief.

DATED: July 9, 1993

Respectfully submitted,

Carlton F. Gunn

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ACKNOWLEDGEMENT

State of California
County of Los Angeles
On , before me, _____
personally appeared Carlton F. Gunn.
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELA M. SANTANA
Notary Public-California
LOS ANGELES COUNTY
My Commission Expires
April 30, 1994